Tan Kim Hor & Ors v Tan Heng Chew & Ors

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP PETITION NO D3 (D2)–28–507 OF 2001
ZULKEFLI J
23 APRIL 2004

Companies and Corporations — Winding up — Petition — Respondents filed application to restrain law firm from acting for petitioners — Whether law firm possessed any information, confidential or otherwise that could be used against respondents — Whether there was conflict of interest — Whether court could grant injunctive relief — Companies Act 1965 ss 218, 221(2)(f)

The case concerned an application filed by the respondents for an order that Messrs Shearn Delamore & Co ('the firm') be restrained from acting for the petitioners pursuant to s 221(2)(f) of Companies Act 1965 ('the Act'), consequential to the winding up petition filed by the petitioners against the respondents pursuant to s 218(1)(i) of the Act.

The petitioners' cause of action was that it was just and equitable to wind up the ninth respondent company, Tan Chong Consolidated Sdn Bhd ('TCC'), given the irretrievable breakdown of mutual trust and confidence between the quasi-partners of the company. The petition was struck out summarily by the court, but Court of Appeal thereafter allowed the petitioner's appeal and set aside the High Court's striking out order and remitted the case to be heard before another High Court judge. Unhappy with the Court of Appeal's decision, the respondent sought leave from the Federal Court but that was dismissed.

The respondents had not objected to the firm's acting for the petitioners previously but when the petition was finally ready for hearing before the court, the respondents filed the application to restrain the firm from hearing.

The firm had previously advised TCC on corporate matters and non-contentious businesses. In another matter, the corporate department only advised TCC in the position of a company and not the individual shareholders. All corporate matters concluded and implemented and corporate department's retainer for the same had ceased. The firm stated that counsel and/or solicitors having conduct of this litigation, were lawyers from the litigation department and they were not involved in the corporate matters of TCC or in the settlement negotiations between the parties prior to the filing of this petition.

Held:

(1) The firm was not in possession of any information, confidential or otherwise, as alleged by the respondents, which the firm was capable of using against the respondents in this petition. The respondents' assumptions of any conflict of interests and confidentiality were seriously misconceived. The allegations were far fetched and were credibly responded to by the petitioners. The partners of the corporate department

in the firm confirmed that during their retainer by TCC, neither the petitioners nor the respondents had confided information, confidential or otherwise, to the firm which are relevant or material to this petition. Their scope of advice to TCC was confined to the company only and not the individual shareholders (see para 9).

(2) The firm was not privy to information of the respondents or their personal business affairs, which were relevant or material to this petition. Further there was no evidence in support of the respondents' bare allegation that the firm may be in possession of confidential information which could be used against them in this petition. The court could not and would not grant an injunction based on bare allegations or assumptions of the respondents. There was no real risk or otherwise, that the firm would disclose any confidential information as alleged by the respondents (see para 10).

(3) The respondents by their conduct and representation in the court proceedings involved between the parties had shown that they waived their rights and were estopped from objecting to the firm acting for the petitioners (see para 11).

(4) Section 221(2)(f) of the Act does not empower the court to grant an injunctive relief as sought by the respondents in this case. The proper procedure for the respondents was to file a fresh action to seek for an injunctive order (see para 12).

(5) The said firm was not in a position of conflict of interest. In determining whether the firm was in a position of conflict of interest, it was also necessary for the court to deal with the statutory provisions available, namely the Legal Profession (Practice and Etiquette) Rules 1978 ('LPR'). The firm was not in breach of r 3 of the LPR as it was not in possession of any confidential information (see para 13).

(6) With regards to the respondents' contention that the partners of the firm would be called as witnesses to testify at the hearing, the court found that such a contention was without merits. In winding up proceedings, the question of calling witnesses was limited to the deponents of affidavits only. The issue of professional independence was not an issue in the manner as envisaged under r 5 of the LPR (see para 14).

[**Bahasa Malaysia summary**

Kes ini berkenaan satu permohonan yang difailkan oleh responden-responden untuk satu perintah bahawa Tetuan Shearn Delamore & Co ('firma itu') disekat daripada mewakili pempetisyen-pempetisyen menurut s 221(2)(f) Akta Syarikat 1965 ('Akta itu'), akibat daripada petisyen penggulungan yang difailkan oleh pempetisyen-pempetisyen terhadap responden-responden menurut s 218(1)(i) Akta itu.

Kausa tindakan pempetisyen-pempetisyen adalah bahawa ia adalah adil dan ekuiti untuk menggulungkan responden ke sembilan, Tan Chong Consolidated Sdn Bhd ('TCC'), memandangkan kegagalan amanah bersama yang tidak dapat dipulihkan di antara kuasi-rakan kongsi-rakan kongsi syarikat itu. Petisyen itu telah dibatalkan secara terus oleh mahkamah, tetapi Mahkamah Rayuan telah membenarkan rayuan pempetisyen-pempetisyen dan mengetepikan perintah pembatalan Mahkamah Tinggi dan telah meremitkan kes itu untuk didengar di hadapan hakim Mahkamah Tinggi yang lain. Tidak berpuas hati dengan keputusan Mahkamah Rayuan, responden-responden telah memohon kebenaran daripada Mahkamah Persekutuan tetapi permohonan itu telah ditolak.

Responden-responden tidak membantah kepada firma mewakili pempetisyen-pempetisyen dahulu tetapi apabila petisyen itu sedia untuk didengar di hadapan mahkamah, responden-responden memfailkan permohonan untuk menyekat firma daripada mendengar.

Firma itu pernah menasihati TCC di dalam perkara-perkara korporat dan urusan-urusan yang tidak dipertikaikan. Di dalam perkara yang lain, bahagian korporat hanya menasihati TCC sebagai syarikat dan bukan pemegang syer sebagai individu. Segala perkara korporat yang diselesaikan dan dilaksanakan dan retainer bahagian korporat untuk yang sama telah tamat. Firma itu berkata bahawa peguam atau peguamcara yang melaksanakan litigasi ini adalah peguam-peguam daripada bahagian litigasi dan tidak terlibat dengan perkara-perkara korporat TCC atau di dalam penyelesaian rundingan di antara parti-parti sebelum pemfailan petisyen ini.

Diputuskan:

(1) Firma itu tidak memegang sebarang maklumat, sulit atau sebaliknya, seperti yang dikatakan oleh responden-responden, yang firma itu dapat gunakan terhadap responden-responden di dalam petisyen ini. Anggapan responden-responden mengenai sebarang konflik kepentingan dan sulit adalah salah tanggap yang serius. Pengataan-pengataan itu tidak masuk akal dan pempetisyen-pempetisyen telah memberi jawapan yang boleh dipercayai. Rakan kongsi bahagian korporat di dalam frima itu mengesahkan bahawa semasa retainer mereka oleh TCC, responden-responden dan pempetisyen-pempetisyen tidak memberi sebarang maklumat, sulit atau sebaliknya kepada firma yang relevan atau material kepada petisyen ini. Skop nasihat mereka kepada TCC adalah terbatas kepada syarikat dan bukan kepada pemegang-pemegang syer sebagai individu (lihat perenggan 9).

(2) Firma itu mempunyai maklumat responden-responden atau urusan peribadi responden-responden, yang relevan atau material kepada petisyen ini. Lagipun, tiada keterangan untuk menyokong pengataan responden-responden bahawa firma itu mempunyai maklumat sulit yang dapat digunakan terhadap pempetisyen-pempetisyen di dalam petisyen ini. Mahkamah tidak boleh dan tidak akan memberikan injunksi

berdasarkan pengataan-pengataan atau anggapan responden-responden. Tiada risiko atau sebaliknya seperti yang dikatakan oleh responden-responden (lihat perenggan 10).

(3) Responden-responden melalui kelakuan dan representasi mereka dihadapan prosiding mahkamah di antara parti-parti telah menunjukkan bahawa mereka telah mengenepikan hak-hak mereka dan diestop daripada membantah kepada firma mewakili pempetisyen-pempetisyen (lihat perenggan 11).

(4) Seksyen 221(2)(f) Akta itu tidak meberi kuasa kepada mahkamah untuk memberikan relif injunksi seperti yang dipohon oleh responden-responden di dalam kes ini. Prosedur yang betul ntuk responden-responden adalah untuk memfailkan tindakan yan baru untuk memohon perintah injunksi (lihat perenggan 12).

(5) Firma itu tidak mempunyai konflik kepentingan. Di dalam menentukan sama ada firma mempunyai konflik kepentingan , ia adalah perlu untuk mahkamah mempertimbangkan peruntukan-peruntukan undang-undang yang sedia ada, iaitu Kaedah-Kaedah Profesyen Undang-Undang (Amalan dan Etika) 1978 ('KPU'). Firma itu tidak melanggar k 3 KPU kerana ia tidak mempunyai sebarang maklumat yang sulit (lihat perenggan 13).

(6) Berhubung dengan pertikaian responden-responden bahawa rakan kongsi-rakan kongsi akan dipanggil sebagai saksi-saksi untuk memberi keterangan pada perbicaraan, mahkamah mendapati bahawa pertikaian itu tidak bermerit. Di dalam prosiding penggulungan persoalan memanggil saksi-saksi terhad kepada orang yang mendeposkan afidavit sahaja. Isu kebebasan profesional tidak seperti isu yang digambarkan oleh k 5 KPU (lihat perenggan 14).]

Notes

For cases on winding up petitions, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1152-1219.

For winding up petition generally, see 6 *Halsbury's Laws of Malaysia*, paras [110.018]–[110.061].

Cases referred to

Tan Kim Hor & Ors v Tan Heng Chew & Ors [2003] 1 CLJ 472 (refd)

Kayla Beveryly Hills (M) Sdn Bhd & Anor v Quantum Far East Ltd & Ors (Uma Devi d/o R Balakrishnan, third party) [2003] 6 MLJ 703 (refd)

Legislation referred to

Companies Act 1965 ss 167(6), 218(1)(i), 221(2)(f)

Legal Profession (Practice and Etiquette) Rules 1978 rr 3, 5

Dato' Cecil Abraham (MK Yee with him) (Shearn Delamore & Co) for the petitioners.

Dato' Shafee (Azhar Azizan with him) (Shafee & Co) for the petitioners.

Lim Kian Leong (Lim Kian Leong & Co) for the respondents.

Zulkefli J:

Introduction

[1] This is an application by way of Notice of Motion filed by the respondents for an order that the firm of Messrs Shearn Delamore & Co ('the firm') including all advocates and solicitors practicing in the firm be restrained from acting for the petitioners pursuant to s 221(2)(f) of the Companies Act 1965 ('the Act') or the inherent jurisdiction of the Court (encl 9).

[2] This application is made following from the winding up petition ('the petition') filed by the petitioners against the respondents pursuant to s 218(1)(i) of the Act. The petition is one of the long running series of cases filed by Dato' Tan Kim Hor, the first petitioner and his family against the family of the late Tan Sri Tan Yuet Foh led by Dato' Tan Heng Chew, the first respondent. The petitioners' cause of action here is that it is just and equitable to wind up the ninth respondent company, Tan Chong Consolidated Sdn. Bhd, ('TCC') given the irretrievable breakdown of mutual trust and confidence between the quasi-partners of the company. It is the contention of the petitioners that TCC, for all intents and purposes, is only a nominal respondent in this action. TCC is the investment holding vehicle for the members of the Tan Chong family comprising of the petitioners and the respondents only.

The Relevant Facts of the Case

[3] In dealing with this application it would be necessary to relate the chronology of proceedings from the High Court to the Federal Court involving the petitioners and the respondents up to the present application as follows:

(a) The petition was presented to this court on 21 May 2001 and the first hearing date was fixed on 16 August 2001.

(b) On 9 October 2001, upon the application of the respondents, Her Ladyship Justice Zainun bte Ali summarily struck out the petition ('the High Court striking out order').

(c) On 29 January 2003, the Court of Appeal allowed the petitioners' appeal and set aside the High Court striking out order. The Court of Appeal further ordered that this petition be remitted to the High Court for trial as soon as possible before another judge. As a result of which, this petition is being heard by this court.

(d) Being dissatisfied with the decision of the Court of Appeal, the respondents sought leave to appeal to the Federal Court on or about 25 February 2003.

(e) On 29 October 2003, the Federal Court dismissed the respondents' leave application vide Federal Court Application No. 08-13- 2003(W).

[4] It is self-evident that the hearing of the petition had been delayed for almost three years. It is to be noted that the firm has been acting as the solicitors or counsel for the. petitioners in no less than ten legal proceedings involving the respondents and/or the companies of the Tan Chong group. In fact, the firm first came on record acting for the first to the fourth petitioners in applying for an order for inspection of accounting records of TCC under s 167(6) of the Companies Act on 28 August 2000. That application was heavily contested by TCC and the respondents.

[5] In respect of the settlement negotiation to resolve this family feud which had taken place prior to filing the petition on 21 May 2001, Mr Lim Kian Leong represented the respondents and Mr Michael Lim from the firm represented the petitioners. The respondents had also not objected to the firm's acting for the petitioners at that time. Only after 29 October 2003, when this petition was finally ready for hearing before this court, the respondents filed the application to restrain the firm from acting.

[6] It is noted that the firm's corporate department had in the past advised TCC on specific corporate matters, these matters involved purely corporate exercises of the company. As evident from the documents, they concerned lodgment of statutory documents with the Registrar of Companies and certain capital reduction exercises. These were non contentious business. In so far as the de-merger exercise of Tan Chong Motor Holdings Berhad ('TCMH') is concerned, the corporate department had only advised TCC as a company and not the individual shareholders. All these corporate matters are concluded and implemented and the corporate department's retainer for the same had ceased.

[7] The firm is one of the largest legal firms in Malaysia. The firm states that presently it has 79 lawyers including 34 partners. The firm occupies a total of six floors at its present premises and the corporate department is separated on a different floor to that of the litigation department. It further states that counsel and/or solicitors having conduct of this litigation, are lawyers from the litigation department and they were never involved in the corporate matters of TCC. Neither were they involved in the settlement negotiations between the parties prior to the filing of this petition.

Decision of the Court

[8] Having studied the, affidavits filed by the petitioners and the respondents and having heard the submission of learned counsels for the petitioners and the respondents, I hereby dismissed the respondent' application

in encl (9) with costs. The following are my grounds in dismissing the respondents' application: A

[9] I am satisfied that the firm is not in possession of any information, confidential or otherwise, as alleged by the respondents, which the firm is capable of using against the respondents in this petition. The respondents' only complaint is that the firm's corporate department had previously advised TCC in certain corporate matters and in its participation of the de-merger exercise of TCMH. I am of the view that the respondents assumptions of any conflict of interest and confidentiality are seriously misconceived. These allegations are far-fetched and have been credibly responded to by the petitioners. The partners of the corporate department in the firm have confirmed that during their retainer by TCC, neither the petitioners nor the respondents had confided information, confidential or otherwise, to the firm which are relevant or material to this petition. Their scope of advice to TCC was confined to the company only and not to the individual shareholders. B C

[10] It is specifically noted that the firm is not privy to information of the respondents or their personal business affairs, which are relevant or material to this petition or which can be used against the respondents in this litigation. More importantly, there is no evidence in support of the respondents' bare allegation that the firm may be in possession of confidential information which can be used against them in this petition. I am of the view that the court cannot and will not grant an injunction based on bare allegations or assumptions of the respondents. And it must be highlighted that this family winding up petition does not deal with the merits or demerits of the de-merger exercise of TCMH, which had been concluded and implemented. There is no risk, real or otherwise, that the firm will disclose any confidential information as alleged by the respondents because there is no such information. On this ground alone, which forms the substratum of the application, this application should be dismissed with cost. D E F

[11] It is clear that the respondents had never objected to the firm from acting for the petitioners since the year 2000. The firm has been the solicitors and/or counsel in no less than ten legal proceedings involving the parties in this family feud. In fact, when the firm first came on record in August 2000 for the first to the fourth petitioners, it was an application by the petitioners as directors of the TCC to appoint an auditor to inspect the accounts of the company. It is my finding that the respondents by their conduct and representation in the court proceedings involved between the parties since the year 2000 have shown that they have waived their right and are estopped from objecting to the Firm acting for the petitioners in this petition. G H

[12] I am also of the view that the provision of s 221(2)(f) of the Act does not empower the court to grant an injunctive relief as sought by the respondents in this case. This section deals with the directions which should be given by the court in hearing a winding up petition or to cure a technical error of the proceedings. Hence, the injunctive relief sought for by the respondents are misconceived and must be dismissed. (See the case of *Tan Kim Hor & Ors* I

v Tan Heng Chew & Ors [2003] 1 CLJ 472). If at all, the proper procedure for the respondents is to file a fresh action to seek for an injunctive order.

[13] With regard to the inherent jurisdiction of the court as a source of power to grant the injunctive relief as sought for by the respondents it is my finding that from the facts, and circumstances of this case and the law in application the said firm is not in a position of conflict of interest. (See the case of *Kayla Beverly Hills (M) Sdn Bhd & Anor v Quantum Far East Ltd & Ors; (Uma Devi d/o R Balakrishnan, third party)* [2003] 6 MLJ 703.) In determining whether the firm is in a position of conflict of interest, it is also necessary for the court to deal with the statutory provisions available, namely the Legal Profession (Practice and Etiquette) Rules 1978 ('LPR') The relevant rules are as follows:

Rule 3 – Advocate and solicitor not to accept brief if embarrassed

(a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed.

(b) An embarrassment arises –

(i) where the advocate and solicitor finds he is in possession of confidential information as a result of having previously advised another person in regard to the same matter;

(ii) where there is some personal relationship between him and a party or a witness in the proceedings.

Rule 5 – No advocate and solicitor to accept brief if difficult to maintain professional independence

(a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.

(b) (i) An advocate and solicitor who has at any time advised or drawn pleadings or acted for a party in connection with the institution or prosecution or defence of any suit, appeal or other proceedings shall not act, appear or plead for the opposite party in that suit, appeal or other proceedings.

(ii) An advocate and solicitor shall not act unless the consent of the first party for whom the advocate and solicitor acted is obtained in writing and the advocate and solicitor is not embarrassed by so acting.

[14] I am of the view that the firm is not in breach of r 3 of the LPR as it is not in possession of any confidential information as alleged by the respondents. It is noted that the firm's corporate department had only advised TCC (not individual shareholders) in respect specific corporate matters and these matter had been completed. It must also be noted that the advice given by the corporate department to TCC was confined to separate corporate matters and they are irrelevant to this winding up petition. Therefore, the issue of embarrassment does not arise.

[15] In so far as the respondents' contention that the partners of the firm will be called as witnesses to testify at the hearing, I find that such a contention

is without merits. In winding up proceedings, the question of calling witnesses is limited to the deponents of affidavits only. In any event, the evidence of the corporate partners of the firm is not relevant to this winding up petition. Their advice was on non-contentious business of TCC at that time. For this reason it is my finding that the issue of professional independence is not an issue in the manner as envisaged under r 5 of LPR.

Order accordingly.

Reported by Annie Boo